

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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|---------------------------|---|--------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Appellee, |) | Docket No. 20-3033 |
| |) | |
| v. |) | |
| |) | |
| ROGER JASON STONE, JR., |) | |
| |) | |
| Appellant. |) | |

EMERGENCY MOTION OF ROGER J. STONE JR:

- 1. TO EXTEND SURRENDER DATE DUE TO EXCEPTIONAL CIRCUMSTANCES PRESENTED BY STONE’S HEALTH CONCERNS IN LIGHT OF THE COVID-19 PANDEMIC;**

- 2. FOR EXPEDITED ACTION BY JULY 13, 2020; OR, IN THE ALTERNATIVE,**

- 3. FOR AN ORDER STAYING THE DISTRICT COURT’S ORDER, DATED JUNE 26, 2020 (ECF # 389), PENDING THE RESOLUTION OF THE INSTANT MOTION.**

INTRODUCTION

This is an emergency appeal from the denial of an unopposed motion to postpone Roger J. Stone, Jr.’s surrender date in light of the COVID-19 pandemic and the medically documented life-threatening health risks that Stone would face if incarcerated at this time. Accordingly, Stone respectfully moves the Court for an order extending his date to surrender to the custody of the Bureau of Prisons (“BOP”) to serve the sentence imposed in *United States v. Stone*, 19-cr-18 (ABJ),

for 51 days, from July 14, 2020 until September 3, 2020. Cir. R. 9(b)(1). Stone was released on bail following his arrest on January 25, 2019, and has remained on bail since, including following his conviction and sentencing. The appeal of Stone's judgment of conviction and sentence is pending in this Court, with Stone's brief due on August 17, 2020.

Stone was convicted for violating 18 U.S.C. § 1505 (Count 1), § 1001(a)(2) (Counts 2-6), and § 1512(b)(1) (Count 7) and, on February 20, 2020, the district court imposed sentence as follows: Count 1, 40 months imprisonment, 24 months supervised release, and a \$20,000.00 fine; Counts 2-6, 12 months imprisonment; Count 7, 18 months imprisonment; the sentences on Counts 2-7 to run concurrently with the sentence on Count 1. Cir. R. 9(b)(1); Exhibit A, Judgment of Conviction (ECF # 328).

On June 23, 2020, Stone filed an Unopposed Motion to Extend Surrender Date (ECF # 381), from June 30, 2020 to September 3, 2020, supported by undisputed medical evidence filed under seal, establishing that, in light of the COVID-19 pandemic, requiring Mr. Stone's incarceration at this time would pose a life threatening risk. *See* Sealed Exhibit "C" hereto; (Sealed ECF #382). On June 26, 2020, the district court issued a Memorandum Opinion in which it denied, in part, and granted, in part, Stone's unopposed motion (ECF # 386). Cir. R. 9(b)(2); Exhibit B, Memorandum Opinion ("Mem. Op.") (ECF # 389). In sum, the district

court has ordered Stone to surrender on July 14, 2020 and changed his conditions of release to require home confinement until that date. Mem. Op. at 5.

As discussed below, in denying Stone's Unopposed Motion to Extend Surrender Date, the district court largely failed to address the evidence that Stone provided that demonstrates that he is at considerable risk from serious health consequences, including death, if his surrender date is not extended until September 3, 2020, failed to give adequate deference to the government's uniform policy not to oppose surrender date extension motions due to the pandemic, and failed to consider authority from around the country on this issue under similar circumstances. Accordingly, this Court should order the extension of Stone's surrender date from July 14, 2020 to September 3, 2020 to avoid the life-threatening risks that he would face in a BOP facility at this time.

It is further requested that the Court take action on this application on or before July 13, 2020 or that it stay enforcement of the district court's order until the resolution of this application to avoid the irreparable harm that would occur if Stone were required to surrender to BOP on July 14, 2020.

Government counsel has advised that before this Court, it consents to having the Motion handled in an expedited manner and does not oppose the entry of a stay if the Motion is not decided prior to July 13, 2020; but it intends to defend the lower court's decision, notwithstanding its position below.

MEMORANDUM OF LAW AND FACT

It is respectfully submitted that, given his medical conditions, supported by undisputed medical evidence filed under seal in the court below, and the current conditions with respect to the COVID-19 pandemic within BOP facilities, which render Stone at grave risk of serious complications if infected with COVID-19, Stone should not be required to surrender to BOP on July 14, 2020.

A. The Controlling Legal Framework.

This Court has jurisdiction to review the district court's order, pursuant 18 U.S.C. § 3145(c), 28 U.S.C. § 1291, and Fed. R. App. P. 9. *See United States v. Roeder*, 2020 U.S. App. LEXIS 10246, *3 (3d Cir. 2020) (reversing district court's denial of unopposed motion and extending surrender date). Under the controlling statutory framework, this Court is empowered to extend Stone's surrender date.

The district court has consistently found that Stone does not pose either a danger to the community or a risk of flight, including following sentencing (ECF # 334, Feb. 20, 2020 Tr. 91: "Under 18 U.S. Code Section 3143(a)(2), I find by clear and convincing evidence you're not likely to feel or pose a danger to any other person or the community, and you will be permitted to voluntarily surrender on a date no earlier than two weeks after the Court has ruled on your pending motion for a new trial."). The government did not challenge that finding in response to Stone's Unopposed Motion to Extend Surrender Date and the district court

effectively reaffirmed its finding in its Memorandum Opinion denying the motion. Consequently, this Court is not called upon to review either of those issues.

Stone's Unopposed Motion to Extend Surrender Date was premised on "the exceptional circumstances arising from the serious and possibly deadly risk he would face in the close confines of a Bureau of Prisons facility, based on his age and medical conditions . . . [which] make the consequence of his exposure to the COVID-19 virus in a prison facility life-threatening." ECF # 381 at 1. This Court reviews *de novo* the issue of the existence of "exceptional circumstances." *Roeder*, 2020 U.S. App. LEXIS 10246, *3 (finding that it must "independently determine whether relief is appropriate" while giving "careful consideration to the reasons offered by the district court" and extending surrender date due to exigency of the circumstances).

1. Stone's Unopposed Motion to Extend Surrender Date Is Consistent With the Department of Justice's Uniform Policy on Extending Surrender Dates in Light of the COVID-19 Pandemic Risks.

As the government advised the district court, the Department of Justice has a uniform policy, in light of the COVID-19 pandemic, issued through a formal directive, not to oppose a defendant's request to extend a voluntary surrender date for up to 60 days, unless the defendant poses an immediate public safety or flight risk. (ECF # 385 at 1). Consistent with that policy, the government did not oppose Stone's motion to extend his surrender date until September 3, 2020. The court

unduly minimized this uniform policy and attempted to discount it based on the notion that there purportedly were no COVID-19 positive inmates at FCI Jesup where Mr. Stone is designated to surrender. (Mem. Op. at 2-3 & n.1). This is completely irrelevant to the uniform policy and ignores other authority on the role such a factor should play in the analysis, including authority concerning FCI Jesup.

There now is rapidly developing information *dehors* the record, demonstrating that these facts have materially changed, with at least 6 inmates and 5 staff at FCI Jesup testing COVID-19 positive. The facility in quarantine status.¹ The BOP website acknowledges 6 positive COVID-19 inmates at Jesup.²

¹ Ordinarily, Movant would not submit facts or argument based on evidence *dehors* the record; however, this is a dynamic situation, with potentially life and death consequences. The undersigned began receiving unsolicited information from inmates at FCI Jesup on July 3, 2020, that inmates had tested positive. All information was immediately conveyed to government counsel on July 3rd and on a continuing basis through July 5th, including reports that staff had tested positive. Instead of providing a substantive response, government counsel scheduled a conference call among counsel for 11:00 a.m., July 6th. It provided some information then; but at 2:13 p.m. on July 6th, government counsel provided updated information, acknowledging now that 5 staff members at the FCI Jesup complex (Medium) have tested COVID-19 positive and that 6 inmates have Abbott tested COVID-19 positive and are awaiting confirmation (4 at the Camp; 2 at the Medium).

Obviously, these facts undermine a premise of the lower court's decision. The preferred course might have been a motion for reconsideration; however, the lower court's decision is flawed on other grounds as well, as demonstrated herein and, timing is a critical factor here vis a vis the July 14, 2020 surrender date at issue and under Circuit Rule 27(f).

² <https://www.bop.gov/coronavirus/>

2. Stone's Unopposed Motion is Consistent With Decisions from Courts Around the Country Regarding Surrender During the COVID-19 Pandemic.

Courts across the country have recognized the serious risks presented by the COVID-19 pandemic and have extended surrender dates accordingly. *Roeder*, 2020 U.S. App. LEXIS 10246, *3 (reversing district court's denial of unopposed motion and extending surrender date); *United States v. Sharp*, No. 19-cr-03 (D. Mt. April 14, 2020) (ECF # 45) (extending deadline for self-surrender "in light of the COVID-19 pandemic and rapidly evolving public health situation in federal detention facilities"); *United States v. Grobman*, 2020 U.S. Dist. LEXIS 63602 (S.D. Fla. March 29, 2020) (Same); *United States v. Powell*, 2020 U.S. Dist. LEXIS 62077 (N.D. Cal. March 27, 2020) (Same); *United States v. Garlock*, 2020 U.S. Dist. LEXIS 53747 (N.D. Cal. Mar. 25, 2020) (extending surrender date until September 2020, and inviting a motion to extend it further in September; "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided"); *United States v. Matthaei*, 2020 U.S. Dist. LEXIS 55110 (D. Idaho March 16, 2020) (Same).

3. Stone's Unopposed Motion Is Consistent With the Decisions of Courts in this District With Respect to Surrender During the COVID-19 Pandemic.

In this district, consistent with the government's uniform policy, courts have also consistently extended surrender dates. *See, e.g., United States v. Benjamin*,

18-cr-0121 (PLF) (April 28, 2020); *United States v. Gana*, 19-cr-0305 (CJN) (D.D.C. June 22, 2020).

In *Benjamin*, the court extended the defendant's surrender date from June 5, 2020 until September 3, 2020, an even longer extension than Stone requested, based on the defendant's health risks in light of the pandemic. In *Gana*, the court extended the defendant's surrender date twice, once from March 31, 2020 until June 30, 2020, and then from June 30, 2020 until August 30, 2020, also based on health risks related to incarceration during the pandemic. *Gana*, 19-cr-305 at ECF ## 37, 40, 42. As discussed below, notwithstanding the district court's effort to distinguish them, Stone's case is more compelling than *Benjamin* and *Gana*.

4. The Exceptional Circumstances Presented by the COVID-19 Pandemic Have Led Courts Around the Country to Take Extraordinary Action.

Courts around the country, in recognition of the exceptional circumstances presented by COVID-19, have even granted bail in cases in which defendants did not otherwise meet the statutory criteria. *United States v. McLean*, 19-cr-380-(RDM) (D.D.C. March 28, 2020) (granting bail notwithstanding the defendant's lengthy criminal history, dangerousness, weight of the offense, nature of the charges, and other statutory factors requiring detention, based on COVID-19 and the risk it poses); *see also United States v. Meekins*, 18-cr-222 (APM) (D.D.C. March 31, 2020) (ECF # 75) (granting release pending sentencing pursuant to §

3145(c), finding “exceptional circumstances” based on defendant’s risk from Covid-19); *United States v. Harris*, 2020 U.S. Dist. LEXIS 53632, *15, 18 (D.D.C. March 27, 2020) (same); *United States v. Castelle*, 18-cr-15 (AKH) (S.D.N.Y. March 31, 2020) (ECF # 673) (granting bail pending appeal based on defendant’s medical condition, age, and recent pneumonia-related surgery without finding of “substantial question”); *United States v. Avenatti*, 2020 U.S. Dist. LEXIS 56258 (C.D. Cal. Mar. 25, 2020) (*sua sponte* inviting defendant to reapply for release based on risk from COVID-19 in prison) *United States v. Barkman*, 2020 U.S. Dist. LEXIS 45628 (D. Nev. March 17, 2020) (suspending intermittent confinement condition of probation due to COVID-19 pandemic);

In *Harris*, 2020 U.S. Dist. LEXIS 53632, the court found that § 3145(c) provides authority to grant bail pending sentencing based on the exceptional circumstances arising from the COVID-19 pandemic and the extraordinary risks to inmates. The court reached this conclusion even though the defendant made no individualized showing of any medical condition that exacerbated the health risk posed by COVID-19. *Id.* at *15-*18.

In *McLean*, 19-cr-380 (RDM), in the context of pretrial detention, the district court found that COVID-19 poses such a serious threat for those who are incarcerated that it has created a situation that falls “outside the congressional paradigm” for the consideration of presumptions regarding bail such that it “not

only rebuts the statutory presumption of dangerousness, *see* 18 U.S.C. § 3142(e), but tilts the balance in favor of release.” *Id.* at ECF # 21.

B. Exceptional Circumstances Warrant Extending Stone’s Surrender Date.

This Court should extend Stone’s surrender date until September 3, 2020, given “that there are exceptional reasons why [Stone’s] detention would not be appropriate,” 18 U.S.C. §3145(c), at the present time. *United States v. Roeder*, 2020 U.S. App. LEXIS 10246, *3 (3d Cir. 2020) (reversing district court’s denial of unopposed motion and extending surrender date).

1. The District Court Failed to Give Sufficient Weight to Stone’s Health Risks.

Given the undisputed medical evidence concerning Stone’s health risks, the circumstances in this case are far more compelling than in *Roeder*. As explained to the district court, this motion is based on the exceptional circumstances arising from the serious and possibly deadly risk that Stone would face in the close confines of a BOP facility, based on his age and medical conditions. Presentence Report, dated January 16, 2020, at ¶¶ 103-04 (ECF # 327) (“PSR”); *see also*, Letter from Stone’s Treating Physician, Dr. Islon Woolf, dated June 17, 2020 (“Woolf Ltr.”) Exhibit “C” Sealed; (ECF # 383) (Sealed). Indeed, Stone’s medical conditions make the consequences of his exposure to COVID-19 in a prison facility life-threatening. *Id.*

His doctor recommends the following:

I highly recommend that he maintain strict quarantine conditions []. He should not be in any situations that would expose him to the SARS-COV-2 virus. He needs to maintain at least 6 feet distance from people. He should avoid closed quarters with many people. He must completely avoid exposure to people with high rates of infections. He needs to avoid shared facilities like shared bathrooms. In my opinion, I do not see how any of these conditions could be met in prison. I am concerned for his health.

ECF # 383, Woolf Ltr.³

The district court discounts Dr. Woolf's letter based largely on his use of the phrase "reasonabl[e] speculation." Mem. Op. at 2. The district court fails to acknowledge, however, that Dr. Woolf explains that the "lack of relevant data and guidance for patients suffering" from Stone's condition is "very concerning" but that, based on the nature of the condition, it is reasonable to speculate that Stone is "at greater risk of infection and greater risk of complications from COVID-19." Exhibit "C" (Sealed) (ECF # 383).

In addition, Dr. Woolf also states that Stone's age, combined with his serious medical conditions (detailed under seal), "significantly increase[es] his risk of COVID-19, COVID-19 complications, and COVID-19 death." *Id.* Wholly ignoring Dr. Woolf's medical opinion, the district court suggests that Stone would

³ Consistent with the district court's approach, this motion contains quotations from Dr. Woolf's letter, but does not reveal any sensitive personal medical information.

not be in danger given that his condition is “medically controlled” and that there are currently no reported COVID-19 cases in the institution to which he has been designated. Mem. Op. at 2-3. The district court, however, makes no allowance for the fact that it may not be possible for Stone’s medical conditions, which require close monitoring and strict compliance with the directions of his physician, to remain controlled within a BOP facility.

2. The District Court Failed to Give Stone the Same Consideration as Similarly Situated Defendants.

The district court states that “the guiding principle must be that Mr. Stone is entitled to no more and no less consideration than any other similarly situated convicted felon.” Mem. Op. at 3. As discussed below, however, the district court’s decision violates that principle.

The district court justifies its decision in part on the ground that BOP previously changed Stone’s surrender date from April 23, 2020 to June 30, 2020 and also on the fact that BOP declined to extend the date past June 30, 2020. Mem. Op. at 3-4. The district court, however, ignores the fact that BOP adjusted the April 23rd surrender date because it conflicted with the district court’s order of April 16, 2020 in which it directed that Stone could not be required to surrender prior to April 30, 2020. Order Denying Motion for New Trial, dated April 16, 2020 (ECF # 361). BOP, therefore, had no discretion and was required to extend Stone’s April 23rd surrender date to comply with the district court’s order.

Furthermore, implicit in the district court's rationale is that, because BOP previously extended Stone's surrender date based on the COVID-19 pandemic, he is not entitled to any additional time. Mem. Op. at 2-3. There is no apparent logic to this conclusion. Stone continues to have medical conditions that his treating physician reasonably believes "significantly increase[] his risk of COVID-19, COVID-19 complications, and COVID-19 death." Exhibit "C" (Sealed).

Moreover, as discussed further *infra*, the COVID-19 pandemic continues to explode and, notwithstanding the current conditions reported at the institution to which Stone is scheduled to report, the dangers from COVID-19 in the prison system are largely unabated and, in fact, appear to be increasing. *See, e.g.*, "The Coronavirus Crisis Inside Prisons Won't Stay Behind Bars," New York Times, June 25, 2020;⁴ "How U.S. Prisons Became Ground Zero for COVID-19," Politico, June 25, 2020.⁵ Thus, the notion that the previous extension of Stone's surrender date weighs against the instant application is wholly unsupported by reason.

As noted above, the district court also seeks to distinguish Stone from the defendants in *United States v. Benjamin*, 18-cr-0121 (PLF) and *United States v. Gana*, 19-cr-0305 (CJN) (D.D.C. June 22, 2020)—two cases that Stone cites in his

⁴ <https://www.nytimes.com/2020/06/25/opinion/coronavirus-prisons-compassionate-release.html>

⁵ <https://www.politico.com/news/magazine/2020/06/25/criminal-justice-prison-conditions-coronavirus-in-prisons-338022>

unopposed motion below in which the government similarly did not oppose the defendants' applications to extend their surrender dates based upon their health risks due to COVID-19—on the grounds that the defendants were not convicted of intimidating a witness and that there is no indication that either previously violated conditions of release. Mem. Op. at 4.

Notwithstanding the differing charges in the cases, the district court has allowed Stone to remain on bail since the date of his arrest, including following conviction and again following sentencing, at which time it reaffirmed its previous finding that Stone presents neither a risk of flight nor a danger. Feb. 20, 2020 Tr. 91. In addition, in an April 16, 2020 order, the district court removed some of the conditions of release that it had previously imposed. ECF # 361. Thus, the claimed distinctions between the cases are far less significant than the district court indicates.

Furthermore, the district court neglects a number of critical similarities between, on the one hand, *Benjamin* and *Gana*, and, on the other, the instant matter, which undercut key aspects of the rationale for its decision.

First, with respect to *Benjamin*, the district court fails to mention that the court entered the judgment of conviction in that case on February 20, 2020, *i.e.*, the *same* day that the district court entered judgment in Stone's case, and that the defendant's surrender date was extended from June 5, 2020 until September 3,

2020, *i.e.*, the same date that Stone requests. *Benjamin*, 18-cr-0121 at Dkt. # 71, 76. Thus, contrary to the district court's indication that Stone has already received ample consideration, Mem. Op. at 3, if required to surrender on July 14, Stone will receive far less consideration than the defendant in *Benjamin*, which conflicts with the guiding principle identified by the district court.

Second, in *Gana*, the court entered the judgment of conviction on February 24, 2020, *i.e.*, just four days after the district court entered Stone's judgment, and the defendant's surrender date was twice extended, once with the government's consent, from March 31, 2020 until June 30, 2020, and then, without opposition from the government, from June 30, 2020 until August 30, 2020. *Gana*, 19-cr-305 at Dkt. # 37, 40, 42. Thus, not only is the defendant in *Gana* currently slated to remain on bail from the date judgment was entered on February 24, 2020 until at least August 30, 2020, the defendant has received two extensions—something to which the district court suggests Stone is not entitled because it would unfairly advantage him as compared to other defendants. It is the district court's denial of Stone's motion, however, that unfairly disadvantages Stone as compared with other defendants who have sought to have their surrender dates extended without opposition from the government. Thus, here, too, the district court does not adhere to its guiding principle.

Stone is far more similarly situated to the defendants in *Benjamin* and *Gana* than the district court indicates; yet only Stone is currently required to report to prison in the height of the pandemic, notwithstanding his documented health problems, which his physician believes place him at heightened risk not only of infection and complications from infection, but of death. Exhibit “C” (Sealed).

Moreover, though expressed in terms of protecting both Stone’s “stated medical concerns [and] . . . the health of other inmates,” the district court’s addition of the condition of home confinement is unnecessarily punitive. Mem. Op. at 4-5. First, though the district court purports to rely on Dr. Woolf’s letter to support the requirement of home confinement, read in its entirety, Dr. Woolf cannot fairly be construed to have recommended that Stone be required, under supervision of Pretrial Services and subject to electronic monitoring, to be confined to his home for 24 hours a day for 18 days.

Second, there is no general requirement that prospective inmates remain on home confinement for 14 days prior to surrender. This requirement appears to be uniquely designed for Stone. Pursuant to current BOP policy, “newly-arriving BOP inmates are processed through quarantine . . . sites and screened for COVID-19 exposure risk factors and symptoms.”⁶ The district court’s order implies that it is more concerned about Stone potentially transporting COVID-19 into FCI Jesup

⁶ https://www.bop.gov/coronavirus/covid19_status.jsp

than with Stone contracting it in the facility, a consideration not present in other cases, given the procedures that BOP has in place.

Third, the district court maintains that the condition of home confinement is imposed in accordance with the guidance provided by the Attorney General, Mem. Op. at 3, but fails to note that the Attorney General's guidance is for inmates who are released to home confinement to complete their sentences but technically remain in BOP custody. Here, by contrast, Stone is not in BOP custody and will not receive credit toward his sentence for any time spent confined to his home. Moreover, as noted above, the government has a uniform policy not to object to requests to extend surrender dates in light of the pandemic, which is not true for compassionate release applications.

The district court's home confinement requirement, therefore, does not accord with his doctor's recommendations or those of the Attorney General; is unnecessarily restrictive; and fails to comport with the district court's stated guiding principle.

The district court also points out that the government's decision not to oppose Stone's motion is inconsistent with its opposition in other cases to applications for compassionate release. Mem. Op. at 3. But, the district court provides no consideration for the fact that an application for compassionate release differs from an application to extend a surrender date in terms of both the standards

that apply, as well as the substantive relief sought. An application for compassionate release seeks to terminate a sentence prematurely, by days, weeks, months, or, in some cases, years. By contrast, extending a surrender date does not reduce the overall length of a sentence, it merely delays its commencement. Consequently, there is nothing unreasonable about the government's adherence to its uniform policy, particularly given the health risks present here.

3. The District Court Failed to Give Adequate Consideration to the Severity of the Risk Arising from the COVID-19 Pandemic in BOP Facilities.

The district court also relied on the fact that BOP has not reported any cases of COVID-19 in FCI Jesup, where Stone has been designated. Mem. Op. at 2-3, n.1. This factual premise no longer applies (*see infra* at n.1); but the lower court erred on this point even under the mistaken factual premise. The district court did not consider the fact that only 30 of 1409 inmates at the institution had been tested. Moreover, BOP reports that it sometimes tests the same person more than one time, so it may be that fewer than 30 inmates have been tested.⁷ Also of concern is that the number of cases in Georgia has recently spiked, with total cases now up to 89,489;⁸ *see also* “‘From bad to worse’: Georgia’s COVID cases, hospitalizations

⁷ <https://www.bop.gov/coronavirus/>

⁸ <https://www.google.com/search?client=safari&rls=en&q=georgia+covid+cases&ie=UTF-8&oe=UTF-8>

on the rise as state reopens.”⁹ This is a factor which must be considered with staff going in and out of FCI Jesup.

The recent spike in cases within Georgia is a factor that a district court in Georgia recently weighed in finding that extraordinary and compelling circumstances exist and granting a compassionate release application from an inmate at the satellite prison camp at FCI Jesup, which is the section of the facility to which Stone is designated:

Finally . . . the Court notes that Asher makes a compelling argument particular to FCI Jesup. From Wednesday, June 10, 2020, to Thursday, June 11, 2020, the number of new COVID-19 cases in Georgia jumped over 26%, the largest jump in cases since Georgia reopened in early May. . . . Since Asher’s counsel filed the Motion for Compassionate Release, the number of reported COVID-19 cases in Wayne County increased from 17 to 33. . . . The number of cases in surrounding counties has also increased.

Asher reports that there is no COVID-19 testing at FCI Jesup, that inmates are leaving the camp and returning after working, seldom wearing masks or personal protective equipment. He also reports that the BOP staff hardly ever wear masks, even when preparing food

United States v. Asher, 2020 U.S. Dist. LEXIS 111205, *18-19 (N.D. Ga., June 15, 2020). The *Asher* court also notes that the physical layout of the institution and the dormitory sleeping arrangements render social distancing virtually impossible and

⁹ <https://www.wjcl.com/article/from-bad-to-worse-georgias-covid-cases-hospitalizations-on-the-rise-as-state-reopens/32890763#>

the spread of infection more likely. *Id.* at 11; *United States v. Feucht*, 2020 U.S. Dist. LEXIS 95104 (S.D. Fla., May 28, 2020) (ordering release from Jesup); *United States v. Ozols*, 16-CR-692-7 (JMF) (S.D.N.Y., June 2, 2020) (ECF #488) (ordering release from Jesup); *see also United States v. Ullings*, 2020 U.S. Dist. LEXIS 830104 (N.D. Ga. May 12, 2020) (discussing rising COVID-19 infections in Georgia);

Furthermore, the risk of an outbreak at FCI Jesup should be considered in conjunction with the fact that, across the BOP system, testing has been sparse and the rate of infection has been high. BOP reports that, as of June 30, 2020, 21,525 inmate tests for COVID-19 have been completed, 2,697 are pending, and 6531 inmates have tested positive for COVID-19.¹⁰ It is also concerning that BOP has tested only 21,525 inmates among a population of 133,384 inmates in BOP prisons and another 13,992 in BOP community facilities. Tragically, 94 inmates have died from the COVID-19 virus, along with one staff member.¹¹

The heightened risk from COVID-19 in the prison system has been widely recognized. *See United States v. Amarrah*, 2020 U.S. Dist. LEXIS 80396 (E.D. Mich., May 7, 2020) (ordering release despite no confirmed COVID-19 cases at FCI Loretto; citing multiple dangers and supporting studies). As a court in the

¹⁰ <https://www.bop.gov/coronavirus/>

¹¹ <https://www.bop.gov/coronavirus/>

Southern District of New York put it, “[t]he risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious.” *Basank v. Decker*, 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020). More recently, on June 18, 2020, the Marshall Project issued a chilling report about the ongoing disaster and repeated missteps within the BOP that have made so many federal prisons hotbeds for the spread of the COVID-19 with deadly results.¹²

In short, the danger to Stone under the current circumstances is undeniable. Indeed, it is respectfully submitted that the Court never should have taken comfort from the lack of any reported cases at FCI Jesup. *See, e.g., United States v. Feucht*, 2020 U.S. Dist. LEXIS 95104, *8 (S.D. Fla., May 27, 2020) (discussing FCI Jesup and noting how, due to the lack of universal testing of inmates and staff, the number of reported cases may be far lower than the actual number of cases and that, irrespective of current numbers at any given facility, “[c]ourts around the country have recognized that the risk of COVID-19 to people in prison is ‘significantly higher than in the community, both in terms of risk of transmission, exposure and harm to individuals who become infected.’”); *see also* “Federal Judges Are Relying on Bureau of Prisons COVID-19 Numbers to Make Rulings,”

¹² https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps?fbclid=IwAR0t7C6pvpfkTmMWuziJSMDq8eoWbZ85x02xDny_-EQ2h2eXQEHpQ_cg9w

Forbes May 20, 2020 (discussing lack of testing by BOP and consequent low number of reported cases);¹³ “CDC Says U.S. Has ‘Way Too Much Virus’ to Control Pandemic as Cases Surge Across Country,” CNBC, June 30, 2020;¹⁴ “A Devastating New Stage of the Pandemic,” The Atlantic, June 25, 2020;¹⁵ “Fighting to Release Prisoners from a COVID-19 Death Sentence,” The American Project, June 24, 2020.¹⁶

The situation is further exacerbated by the fact that no visits, including attorney-client visits, are permitted at FCI Jesup, because of the COVID-19 pandemic. Courts have long recognized that it is far more difficult to communicate with a client for purposes of his appeal when he is in custody. *Garza v. Idaho*, — U.S. —, 139 S. Ct. 738, 745, 203 L. Ed. 2d 77 (2019); *Peguero v. United States*, 526 U.S. 23, 26 (1999) and here that difficulty is far greater, in light of the COVID-19 restrictions in place, limiting phone access as well. These problems, implicating the Sixth Amendment right to effective assistance of appellate counsel, are fully avoidable, with a surrender date extension.

¹³ <https://www.forbes.com/sites/walterpavlo/2020/05/20/federal-judges-are-relying-on-bureau-of-prisons-covid-19-numbers-to-make-rulings/#7d87472412c7>

¹⁴ <https://apple.news/A9wTp-0LLQ86Jtq7XQ-dBTA>

¹⁵ <https://apple.news/AVEFF7j2LQlqZdZ63mFox2w>

¹⁶ <https://prospect.org/api/amp/justice/fighting-to-release-prisoners-from-covid-19-death-sentence/>

CONCLUSION

For the reasons set forth above, including that that Stone is not a danger or a flight risk and has serious medical issues, combined with the exceptional circumstances that exist in the prison system as the result of the COVID-19 pandemic, and the lack of any reasonable basis to deny Stone's unopposed motion to extend his surrender date, it is respectfully submitted that this Court should (a) extend Stone's surrender date until September 3, 2020; (b) reinstate the bail conditions in effect prior to the district court's order, dated June 26, 2020; (c) rule on this application on or before July 13, 2020 to avoid the irreparable harm that would ensure were Stone required to surrender on July 14, 2020, or, in the alternative, stay the district court's order (ECF # 389) until the resolution of this application; and (d) grant such other and further relief as the Court deems just and proper.

Dated: July 6, 2020

Respectfully submitted,

/s/ Seth Ginsberg

/s/ David I. Schoen

Counsel for Appellant Roger J. Stone, Jr.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) because it contains 5192 words, excluding the parts of the motion exempted by the Rule.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. Circuit Rule 27(d)(1)(E).

s/David I. Schoen
Attorney for Appellant

CERTIFICATE

Undersigned counsel hereby certifies that Roger J. Stone, Jr. is not pursuing the appeal of his conviction and sentence for purposes of delay.

s/Seth Ginsberg
SETH GINSBERG

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, I electronically filed the foregoing and the accompanying attachments with the Clerk of the Court using CM/ECF. I also certify that the foregoing document and the accompanying attachments are being served this day on the United States Attorney's Office, via ECF and email.

I further certify that counsel communicated by telephone with the Clerk of the Court and with government counsel regarding the need for expedited action on this motion.

By: /s/ David I. Schoen

EXHIBIT A

District of Columbia

V.

JUDGMENT IN A CRIMINAL CASE

USM Number: 19579-104

THE DEFENDANT:

☒ was found guilty on count(s) One (1) through Seven (7) of the Indictment.
after a plea of not guilty.

FEB 20 2020

**Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia**

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|----------------------------|----------------------------|----------------------|--------------|
| 18:1505 and 2; | Obstruction of Proceeding. | 12/31/2017 | 1 |
| 18:1001(a)(2) and 2; | False Statements. | 9/26/2017 | 2-6 |
| 18:1512(b)(1); | Witness Tampering. | 1/24/2019 | 7 |

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

2/20/2020

Signature of Judge

Name and Title of Judge

(Page 28 of Total)

DEFENDANT: ROGER J. STONE, JR.
CASE NUMBER: 19-018 (ABJ)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 1: 40 months of incarceration.
Counts 2-6: 12 months of incarceration to run concurrent to Count 1.
Count 7: 18 months of incarceration to run concurrent to Count 1.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant serve his sentence at a facility near Fort Lauderdale, Florida to allow him to be as close to his family as possible.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☒ as notified by the Probation or Pretrial Services Office, but no earlier than 14 days after the Court has ruled on defendant's Motion for New Trial [Dkt. 313].

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROGER J. STONE, JR.
CASE NUMBER: 19-018 (ABJ)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Counts 1-7: 24 months on each count, to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ROGER J. STONE, JR.
CASE NUMBER: 19-018 (ABJ)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: ROGER J. STONE, JR.
CASE NUMBER: 19-018 (ABJ)

SPECIAL CONDITIONS OF SUPERVISION

DNA Sample Requirement - Pursuant to 42 USC § 14135a, for all felony offenses, the defendant shall submit to the collection and use of DNA identification information while incarcerated in the Bureau of Prisons, or at the direction of the United States Probation Office.

Substance Abuse Testing - The defendant shall submit to substance testing within 15 days of his placement on supervision, and periodically thereafter, including random testing without notice to the defendant, at the direction of the United States Probation Office.

Substance Abuse Treatment - If indicated, the defendant shall participate in any program approved and directed by the United States Probation Office.

Community Service - The defendant must complete Two Hundred Fifty (250) hours of hands-on, community service. This obligation may not be satisfied with mere fundraising, advocacy, or attendance at religious services, although the community service may be in connection with the defendant's place of worship. The United States Probation Officer will supervise the completion of this condition by approving the program, and the defendant must provide verification of his completed hours to the United States Probation Office.

Financial Payment - The defendant must begin to make payments on the financial penalty within 60 days after his release from imprisonment, in the amount of at least \$1,000.00 per month. The defendant must provide the United States Probation Office with access to any requested financial information and authorize the release of any requested financial information, which the United States Probation Office may share with the United States Attorney's Office.

Financial Disclosure - The defendant shall provide the United States Probation Office with his income tax returns, authorization for release of credit information, and information about any business or finances in which he has a control or interest until the penalty has been satisfied.

Transfer of Supervision - The Court will transfer the supervision of, but not jurisdiction over, the defendant's supervised release to the Southern District of Florida.

Re-entry Progress Hearing - The United States Probation Office in that district must submit a progress report to the Court within sixty (60) days of the defendant's commencement of supervision; upon receipt of the the progress report, the Court will determine if the defendant's appearance is required at a re-entry Progress Hearing.

Notice of Appeal - Pursuant to Federal Rule of Appellate Procedure 4(b)(3) and (4), the defendant must file any Notice of Appeal within 14 days after the Court has ruled on defendant's pending motion for new trial [Dkt. 313].

DEFENDANT: ROGER J. STONE, JR.
CASE NUMBER: 19-018 (ABJ)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | | | | | |
|--------|-------------------|--------------------|--------------|-------------------------|--------------------------|
| | <u>Assessment</u> | <u>Restitution</u> | <u>Fine</u> | <u>AVAA Assessment*</u> | <u>JVTA Assessment**</u> |
| TOTALS | \$ 700.00 | \$ 0.00 | \$ 20,000.00 | \$ 0.00 | \$ 0.00 |

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss***</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|----------------------|----------------------------|-------------------------------|
|----------------------|----------------------|----------------------------|-------------------------------|

| | | | | |
|--------|----|------|----|------|
| TOTALS | \$ | 0.00 | \$ | 0.00 |
|--------|----|------|----|------|

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ROGER J. STONE, JR.
CASE NUMBER: 19-018 (ABJ)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 700.00 due immediately, balance due
- ☐ not later than _____, or
- ☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☒ Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$ 1,000.00 over a period of 20 month (e.g., months or years), to commence 60 days (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Special Assessment is payable in accordance with 18 U.S.C. § 3013.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---------------------------|---|--------------------------------|
| _____ |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| v. |) | Crim. Action No. 19-0018 (ABJ) |
| |) | |
| ROGER J. STONE, JR., |) | *** SEALED *** |
| |) | |
| Defendant. |) | |
| _____ |) | |

MEMORANDUM OPINION

Defendant Roger J. Stone has filed a motion seeking an extension of the date he must surrender to the Bureau of Prisons (“BOP”) to begin serving his sentence. Unopposed Mot. to Extend Surrender Date [Dkt. # 381] (“Def.’s Mot.”).

On November 15, 2019, Stone was convicted of obstructing a Congressional proceeding, threatening a witness, and five counts of lying to Congress. *See* Verdict Form [Dkt. # 260]. On February 20, 2020, the Court sentenced him to a term of forty months of incarceration, and it ordered that he must self-surrender when notified, but no earlier than fourteen days after the Court ruled on the then-pending motion for new trial. Judgment [Dkt. # 328] at 2. The defendant has since been directed to report on June 30, 2020.

A week before his designated report date, defendant filed the instant motion asking the Court to extend his voluntary surrender date to September 3, 2020 in recognition of “his heightened risk of serious medical consequences from exposure to the COVID-19 virus in the close confines of a BOP facility.” Def.’s Mot. at 1. He also pointed to memoranda from the Attorney General endorsing the increased use of home confinement during the COVID-19 pandemic. *Id.* at 2, citing Memorandum from the Attorney General to Director of BOP, “Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic” (March 26, 2020) (“Mar. 26, 2020 AG Memo. to Dir. of BOP”); Memorandum from the Attorney General to Director of BOP, “Increasing Use of Home Confinement at Institutions Most Affected by COVID-19” (April 3, 2020).

Defendant asserts that he would face “possibly deadly risk . . . in the close confines of a Bureau of Prisons facility,” Def.’s Mot. at 1, citing Revised Final Presentence Investigation

Report [Dkt. # 327] ¶¶ 103–04 (Sealed), and he has provided the Court with a letter from his treating physician. Physician Letter [Dkt. # 383] (Sealed). There is a considerable body of public information concerning the undeniable risk of contamination in prison settings in general, and it is essential to treat this information seriously. However, the defendant does not point to anything other than his doctor’s “[r]easonabl[e] speculation” to support the conclusion that he is particularly vulnerable to infection or complications from infection for reasons other than his age. *Id.*

The defense represented in its pleading that the United States did not oppose the motion.

On June 23, 2020, the Court issued a minute order asking the government to set forth its position in writing. Min. Order (Jun. 23, 2020). The government informed the Court that its decision not to oppose the motion was driven solely by guidance from the Department of Justice and the Executive Office of United States Attorneys that “U.S. Attorney’s Offices should not object to a defendant’s request to extend a voluntary surrender date for up to 60 days, even at this stage of the pandemic, unless the defendant poses an immediate public safety or flight risk.” Gov’t Resp. to Court’s June 23, 2020 Min. Order [Dkt. # 385] (“Gov’t Resp.”) at 4, citing Mar. 26, 2020 AG Memo. to Dir. of BOP. According to the government, “[t]he directive applies to defendants whether they pled guilty or were found guilty after a trial, and without respect to age, health, or other COVID-19 risk factors.” *Id.* The government further explained:

This guidance stems from the Attorney General’s March 26, 2020 Memorandum for Director of Bureau of Prisons on “Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic,” which directed BOP to utilize home confinement “where appropriate, to protect the health and safety of BOP personnel and the people in [BOP] custody.” *Available at* <https://www.justice.gov/file/1262731/download> (last viewed June 25, 2020).

Id.

This is a salutary policy, and judges and defendants in this courthouse and others will welcome its continued evenhanded application.

The Court notes, though, that in its submission, the government also points out that there are currently no COVID-19 cases at the facility to which defendant has been designated. Gov’t

Resp. at 3, n.1.¹ This is a factor the government has relied upon in other pleadings filed with this Court as a reason to oppose motions for compassionate release. *See, e.g., United States v. Mahone*, 17-cr-236, Gov’t Opp. to Def.’s Mot. for Compassionate Release [Dkt. # 57] at 18. In another opposition that remains sealed to protect private medical information, the government similarly emphasized the absence of infection in a separate facility, and it asserted that the primary medical condition at issue here – even in an older defendant – did not warrant release under the Centers for Disease Control guidance since it was “in check.” *See United States v. [REDACTED]*, 18-cr-[REDACTED][Dkt. REDACTED] (Sealed) at 11 (“For the most part, the government appreciates and does not dispute the underlying health concerns presented by the defendant. But such conditions are worth assessing in nuance.”); *id.* 12–13. Here, defendant’s condition appears to be – as it has been for some time – medically controlled.

At the end of the day, the guiding principle must be that Mr. Stone is entitled to no more and no less consideration than any other similarly situated convicted felon.

The difficulty in this case is figuring out who is truly “similarly situated.” Notably here, the record reflects that the defendant has already received a reprieve of the recommended length through the good graces of the Bureau of Prisons, an agency within the Department of Justice. Just one day after the Court ruled on the motion for new trial, in response to a request from the defense, based on the same concerns that are raised here, the BOP accorded the defendant an additional sixty days to surrender beyond the fourteen that were required by the Judgment and Commitment Order. *See* Ex. 1 to Gov’t Resp. [Dkt. # 385-1]; *see also* Def.’s Resp. to Court’s Order dated June 25, 2020 [Dkt. # 386]. And the Bureau itself is not of the view that another extension on this basis is warranted. *See* Def.’s Resp. to Court’s Order dated June 25, 2020 at 2 (“On or about June 10, 2020, government counsel informed undersigned counsel that he had

¹ In his pleading, the defendant stated, “[w]hile the BOP website currently does not show any inmates with the COVID-19 virus at FCI Jesup, it reports that there are 25 tests pending. <https://www.bop.gov/coronavirus/>. Given that the BOP does not routinely test inmates, combined with the relatively high positivity results in BOP facilities, the pending tests do not bode well.” Def. Mot. at 3–4 (footnotes omitted). But this was pure speculation. The government explains, “[a]ccording to BOP, all 25 tests referenced in the motion were administered because those inmates were due to be transferred or released to the community. Under BOP protocols, quarantine and testing is required before inmates leave the facility. All 25 tests came back negative. As of the close of business yesterday, June 24, 2020 – the most recent date for which data are available to report today – there have been no confirmed COVID-19 cases among either staff or inmates at FCI Jesup.” Gov’t Resp. at 3, n.1.

been in contact with BOP and had been informed that BOP was no longer extending surrender dates based on COVID-19 and that, therefore, BOP would not be changing Stone's June 30, 2020 surrender date.").

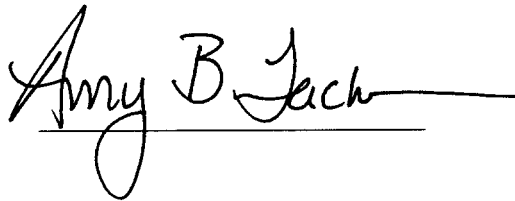
Moreover, while defendant correctly observes that other courts in this district have granted extensions in *United States v. Benjamin*, 18-cr-0121, and *United States v. Gana*, 19-cr-305, neither of those defendants was convicted of threatening anyone, and there is no indication that either failed to abide by conditions of release at any time. By contrast, Mr. Stone was convicted of threatening a witness, and throughout the course of these criminal proceedings, the Court has been forced to address his repeated attempts to intimidate, and to stoke potentially violent sentiment against, an array of participants in the case, including individuals involved in the investigation, the jurors, and the Court. *See* Gov't Resp. at 5 (recounting defendant's "attempt to incite violence upon a federal judge, . . . his abuse of social media and other media outlets to intimidate individuals and witnesses involved in this case, . . . his patently false statements at the February 21, 2019, show cause hearing, . . . and . . . his now final conviction for witness tampering, including threats of physical harm to a witness").

It is true, as the government points out, that at the time of sentencing, the Court was aware of these circumstances, and it permitted the defendant to voluntarily surrender over the prosecutor's objection. But as of February 20, the defendant had not yet been designated to an appropriate minimum-security federal facility, and remanding him at that time would have required his incarceration at a local jail approximately 1,000 miles from his home and family until the designation was accomplished. Also, there was already a motion for new trial pending, flight was not a factor, and it is fair to say that no one was contemplating that approving voluntary surrender could lead to a possible six-month delay in reporting.

For all of these reasons, the Court will grant the motion in part, and it is hereby **ORDERED** that the defendant's date to surrender to the Bureau of Prisons will be extended for another fourteen days, until July 14, 2020. This affords the defendant seventy-five days beyond his original report date. It is **FURTHER ORDERED** that during that time, defendant's conditions of release will be modified to include the condition of home confinement in accordance with the Attorney General's memorandum and the strong medical recommendation submitted to the Court by the defense that he "maintain strict quarantine conditions." Letter

at 1.² Pretrial Services may monitor his compliance through any appropriate electronic or non-electronic means selected in its discretion in accordance with its current practices, which may include such methods as SmartLINK or Voice Recognition. This will address the defendant's stated medical concerns during the current increase of reported cases in Florida, and Broward County in particular, and it will respect and protect the health of other inmates who share defendant's anxiety over the potential introduction and spread of the virus at this now-unaffected facility.

SO ORDERED.

A handwritten signature in black ink, reading "Amy B. Jackson", with a horizontal line underneath the signature.

AMY BERMAN JACKSON
United States District Judge

DATE: June 26, 2020

2 The letter from defendant's internist stated:

I highly recommend that he maintain strict quarantine conditions. . . . He should not be in any situations that would expose him to the SARS-COV-2 virus. He needs to maintain at least 6 feet distance from people. He should avoid closed quarters with many people. He must completely avoid exposure to people with high rates of infections.

Letter at 1. Defendant's response to the Court's inquiry concerning his personal preventive practices and avoidance of public gatherings in accordance with these directives was vague, carefully parsed, and not reassuring. Def.'s Resp. to Court's Sealed Order Dated June 24, 2020 [Dkt. # 387] (Sealed) at 1 (Stone has spent "the overwhelming majority" of his time at his home; he wears a mask "in the appropriate situations;" he avoids closed quarters with "numerous" people for "extended" durations; he has "on at least one occasion" attended a gathering at which more than ten people were present; and he has been present in public places such as restaurants "as local regulations have permitted.").